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San Juan Pools and or Utah Insurance Fund v. David D. Sweeney Utah State Second Injury Fund and Utah State Industrial Commission : Vaughn's Heating and Appliance and or Utah State Insurance Fund v. Mike Maupin and Second Injury Fund and Utah State Industrial Commission : Brief of Appellant

Utah Supreme Court

THE SUPREME COURT OF THE STATE OF UTAH

1985 20460

SAN JUAN POOLS and/or UTAH INSURANCE FUND, Plaintiffs on Appeal/ Appellants, -v- DAVID D. SWEENEY, UTAH STATE SECOND INJURY FUND and UTAH STATE INDUSTRIAL COMMISSION, Defendants on Appeal/ Respondents.	:	Case No. 20460
VAUGHN'S HEATING & APPLIANCE and/or UTAH STATE INSURANCE FUND, Plaintiffs on Appeal/ Appellants, -v- MIKE MAUPIN and SECOND INJURY FUND, and UTAH STATE INDUSTRIAL COMMISSION, Defendants on Appeal/ Respondents.	:	Case No. 20474

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT OF ISSUES PRESENTED ON APPEAL

These two cases present the issue of whether Utah Code Ann., Section 35-1-69(1)(b) (1953, as amended 1981) requires reimbursement from the Second Injury Fund to an employer who has paid temporary total compensation and medical benefits if the worker's compensation applicant's permanent physical impairment attribut-

able to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions is greater than 20%.

STATEMENT OF FACTS

Sweeney

1. The Utah State Insurance Fund was the compensation carrier for San Juan Pools on July 18, 1983, when a fiberglass slide fell, hitting Mr. Sweeney on the head (R. 78-80, 97). The injury resulted in the excision of a herniated cervical disc and a fusion of the vertebrae (R. 98-117).

2. Mr. Sweeney had been involved in numerous industrial and non-industrial accidents prior to July 18, 1983, which resulted in permanent bodily impairment (R. 49-78).

3. Mr. Sweeney was rated by the independent medical panel as having the following pre-existing permanent bodily impairment prior to the accident of July 18, 1983:

a. 5% whole body impairment to the thoracic spine (R. 828, 846);

b. 5% whole body impairment to the left hand and wrist (R. 828, 846);

c. 20% whole body impairment to the left knee (R. 828, 846).

Pursuant to the combined values chart, Mr. Sweeney's bodily impairment prior to July 18, 1983 was 28% (R. 859).

4. The independent medical panel assigned a 20% whole body impairment to the cervical spine injury resulting from the July 18, 1983 accident (R. 829).

5. 20% impairment of the 72% unimpaired man resulted in the Utah State Insurance Fund being liable for 14.4% whole body impairment (the Administrative Law Judge rounded this to 15%) (R. 849).

6. The Utah State Industrial Commission required the State Insurance Fund to pay Mr. Sweeney 15% permanent impairment. It also required the State Insurance Fund to pay all of the temporary total compensation and medical benefits resulting from the July 18, 1983 accident without reimbursement from the Second Injury Fund (R. 850-851, 887).

Maupin

The facts relevant to this appeal are as follows:

1. Mr. Maupin suffered injuries when he fell from a ladder on June 16, 1982, while in the process of installing an air conditioner on the roof of a house (R. 21-22, 821).

2. As a result of Mr. Maupin's fall from the ladder, he was determined by the independent medical panel to have the following permanent physical impairments:

a. 5% permanent partial impairment for residuals of sprain of the spine;

b. 15% loss of bodily function for psychiatric difficulties resulting from the injuries;

c. 17% hearing loss in the right ear (R. 222, 223).

This totals 37% permanent bodily impairment caused by the industrial accident. However, when the Administrative Law Judge used the combined values chart, the resulting physical impairment was 33% (R. 304).

3. In addition to the impairments that Mr. Maupin suffered in his June 16, 1982 industrial accident, he had also lost or permanently injured several fingers on his left hand in a non-industrial accident that occurred in October of 1976 (R. 42-43). The independent medical panel rated these left hand deficiencies as a 22% permanent partial impairment of the whole body.

4. The Administrative Law Judge, in his Amended Findings of Fact, Conclusions of Law and Order, found the employer and its insurance carrier liable for 25.74% permanent partial impairment. This was computed by determining the impact of a 33% impairment on a 78% person (R. 304).

5. The Administrative Law Judge required the employer and its insurance carrier to pay Mr. Maupin the permanent partial disability of 25.74% of the whole person, and required the Second Injury Fund to pay Mr. Maupin 22% permanent physical disability of the whole person (R. 305). The Administrative Law Judge, however, denied the employer and its insurance carrier reimbursement from the Second Injury Fund for medical benefits and temporary total compensation which it had paid (R. 305-306).

6. The Industrial Commission, in its denial of the employer's Motion for Review, refused to allocate medical expenses and temporary total compensation paid by the employer (R. 310-312).

SUMMARY OF ARGUMENT

The Industrial Commission acted arbitrarily, capriciously and in excess of its authority by failing to allocate temporary total compensation and medical benefits between the employer and the Second Injury Fund, as required by Utah Code Ann., Section 35-1-69.

ARGUMENT

UTAH CODE ANN., SECTION 35-1-69(1)(b) REQUIRES AN ALLOCATION OF TEMPORARY TOTAL COMPENSATION AND MEDICAL BENEFITS IN BOTH OF THE CONSOLIDATED CASES HEREIN.

The clear language of Utah Code Ann., Section 35-1-69(1)(b) (see Attachment A) mandates that when combined disabilities are determined, the industrial accident results in permanent physical impairment of 10% or greater, and the injured party has permanent physical impairment resulting from all causes and conditions greater than 20%, it is assumed that the industrial accident was made substantially greater by the pre-existing condition, and an allocation must be made to the Second Injury Fund. That Section requires the Second Injury Fund to reimburse the employer and its insurance carrier for temporary total compensation and medicals based on the percentage of permanent disability attributable to preexisting conditions.

Despite the numerous motions for review in both of these cases, the Administrative Law Judge and the Industrial Commission provided no reasoning for their failure to apply the statute as written. Such action by the Commission is arbitrary, capricious

and beyond the scope of their authority, and must be reversed by this Court.

This Court has consistently required that the Industrial Commission allocate medical benefits and temporary total compensation between the Second Injury Fund and the employer based on the percentage permanent partial impairment from pre-existing conditions bears to the applicant's total permanent physical impairment attributable to all causes and conditions. See McPhie v. United States Steel Corp., 551 P.2d 504 (Utah 1976); Intermountain Health Care, Inc., v. Ortega, 562 P.2d 617 (Utah 1977); American Coal Co. v. Sandstrom, 689 P.2d 1 (Utah 1984).

The Administrative Law Judge, in his Amended Findings of Fact, Conclusions of Law and Order, relied on the case of Day's Market, Inc., v. Muir, 669 P.2d 440 (Utah 1983), and cited the following language:

> The Fund's (Second Injury Fund) only application is where the current incapacity is substantially greater than (the employee) would have incurred if he had not had the pre-existing incapacity. This language requires a finding as to the effect the pre-existing incapacity had on the current incapacity. The finding in the abstract as to the total pre-existing incapacity is of little assistance in making this determination, since the full responsibility falls upon the current employer unless it could be said that the current incapacity is substantially greater than it would have been "but for" the pre-existing incapacity.

This Court was interpreting the pre-1981 statute in the Muir case. While the Administrative Law Judge accurately cites from that case, the language used stands for the proposition that the

Commission must make proper findings of fact in order to award Second Injury Fund benefits. In the 1981 amendment to Section 69, however, the Legislature added a paragraph in which the term "substantially greater" which is used in the first paragraph, is defined:

> For the purposes of this Section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of combined injuries as provided above; provided, however, that (b) where there is no such aggravation, no award for combined injuries shall be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%.

This additional legislative language establishes two separate circumstances under which the Commission must find that permanent incapacity is substantially greater than the applicant would have incurred if one of two conditions exist: (a) there is an aggravation of a pre-existing injury; or (b) if the industrial injury is 10% or greater and the total physical impairment from all causes and conditions is greater than 20%. While the Administrative Law Judge was well instructed that he must make a finding of substantially greater in order to trigger Second Injury Fund benefits as required by Day's Market, he is clearly required to make such a finding in both of the instant cases because in each case, although the applicant suffered an injury by industrial accident to areas of the body that were not previously incapacitated and

thus the industrial injury did not constitute an aggravation, each of the applicants suffered 10% or greater permanent incapacity as a result of the industrial accident and had permanent physical impairment in excess of 20% from all causes and conditions. Clearly, the statutory trigger for "substantially greater" is met in both of these cases. When such occurs, the provisions of the statute and provisions of this Court's prior cases requires that the Administrative Law Judge allocate temporary total compensation and medical benefits based on the combined disabilities. See American Coal Co. v. Sandstrom, supra.

In denying the motions for review in both of the consolidated cases, the Industrial Commission failed to address the arguments raised by the State Insurance Fund requesting application of the provisions of the 1981 amendments to Section 69, and continued to characterize the cases as cases where no aggravation occurred to a pre-existing condition, a claim which the State Insurance Fund clearly never made. The rationale of the Commission's denials of motions for review is that there would not be an allocation of temporary total disability benefits and medical expenses where the industrial accident did not act upon, change or in any way increase the pre-existing condition. The Commission clearly ignores this Court's oft stated purpose underlying the Second Injury Fund; that is, to encourage employers to hire previously impaired individuals.

While Mr. Maupin's fall from the ladder did not directly harm his previously impaired left hand, he clearly went from a 22%

impaired person to a 48% impaired person. Likewise, while Mr. Sweeney's rupture of the cervical disc did not act directly upon his previously impaired knee or thoracic spine, he went from a 28% impaired man to a 42% impaired man. While it is absurd for the Commission to ignore the direct statutory language, it seems even more farcical that the Commission cannot find that each of these men has permanent incapacity which is substantially greater than they would have incurred if it had not been for their pre-existing incapacity. When such test is met either by meeting the 10/20 Rule specified in the statute, or by the Industrial Commission making the finding that permanent incapacity was made substantially greater by a pre-existing incapacity, Utah Code Ann., Section 35-1-69 is clear that:

> Compensation, medical care and other related items as outlined in Section 35-1-81 shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only and the remainder shall be paid out of the Second Injury Fund provided for in Section 35-1-68(1).

CONCLUSION

Both of the applicants suffered industrial injuries that resulted in permanent incapacities greater than 10%. Each applicant now has permanent incapacities in excess of 20% from all causes and conditions. The 1981 amendment to Utah Code Ann., Section 35-1-69, in paragraph (1)(b) requires the Commission to find that the applicant's incapacity was made substantially greater due to the pre-existing conditions and to allocate

temporary total compensation and medical benefits between the employer and the Second Injury Fund.

DATED this 29th day of April, 1985.

BLACK & MOORE

Fred R. Silvester

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief of Appellants, postage prepaid, this 29 day of April, 1985, to the following:

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ATTACHMENT A

35-1-69. Combined injuries resulting in permanent incapacity -- Payment out of second injury fund -- Training of employee. (1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as outlined in section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only and the remainder shall be paid out of the second injury fund provided for in section 35-1-68 (1).

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided above; provided, however, that (b) where there is no such aggravation, no award for combined injuries shall be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. Where the pre-existing incapacity referred to in subsection (1) (b) of this section previously has been compensated for, in whole or in part, as a permanent partial disability under this act or the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the second injury fund under this paragraph.

Where the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the second injury fund as provided for herein, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made hereunder.

A medical panel having the qualifications of the medical panel set forth in section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition or conditions, whether due to accidental injury, disease or congenital causes. The industrial commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and any amounts remaining to be paid hereunder shall be payable out of the second injury fund; provided, however, that medical expenses shall be paid in the first instance by the employer or its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury shall be reimbursed to the employer out of the second injury fund upon written request and verification of amounts so expended.

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